No. 01-1420

Supreme Court U.S.
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IN THE

Supreme Court of the United States

WASHINGTON STATE DEPARTMENT OF SOCIAL AND HEALTH SERVICES, *et al.*,
Petitioners,

v.

GUARDIANSHIP ESTATE OF DANNY KEFFELER, BY WANDA PIERCE, GUARDIAN, and other persons similarly situated,
Respondents.

On Writ of Certiorari to the Supreme Court of Washington

BRIEF OF CHILDREN'S DEFENSE FUND, CATHOLIC CHARITIES USA, CHILD WELFARE LEAGUE OF AMERICA, AND ALLIANCE FOR CHILDREN AND FAMILIES AS *AMICI CURIAE* IN SUPPORT OF PETITIONERS

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INTEREST OF *AMICI CURIAE* [1]

As set forth in their earlier brief as *amici curiae* in support of the petition for a writ of certiorari, a*mici curiae* Children's Defense Fund, Catholic Charities USA, Child Welfare League of America, and Alliance for Children and Families (collectively, "*amici*") are national, non-profit organizations dedicated to, among other things, identifying and addressing

[1] No counsel for any party had any role in authoring this brief, and no person other than the named *amici* and their counsel made any monetary contribution to its preparation and submission.

issues impacting children in the United States—including children with special needs and/or disabilities who are in foster care and are eligible for benefits from the Social Security Administration.[2]

For thirty years, the Children's Defense Fund ("CDF") has been advocating to ensure every child in America a Healthy Start, a Head Start, a Fair Start, a Safe Start, and a Moral Start in life and a successful passage to adulthood with the help of caring families and communities. CDF pays particular attention to the needs of poor and minority children and those with disabilities, including children who have been abused and/or neglected and, as a result, sometimes end up in the public foster care system. In its advocacy for children, CDF has seen first-hand the vital role that the federal Supplemental Security Income ("SSI") Program plays in securing the futures of children with a wide range of physical, emotional, and mental disabilities.

Since 1727, Catholic Charities USA ("Catholic Charities") has operated one of the nation's largest, private networks of independent social service agencies and volunteers dedicated to reducing poverty, supporting families, and building communities in the United States. Today, more than 1,400 local Catholic Charities agencies with more than 300,000 staff members and volunteers serve nearly 10 million people in need each year. Many of these Catholic Charities agencies provide direct services to children in the foster care system, including nearly 20,000 children in 1999 alone. In addition, Catholic Charities agencies facilitate the adoption of children in foster care and others, completing 4,384 adoptions in 1999, 60% of which were for children with special needs.

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[2] Counsel for both petitioners and respondents have consented to the filing of this Brief. Pursuant to Sup. Ct. R. 37.3(a), *amici* have filed letters stating such consent with the Clerk of the Court.

The Child Welfare League of America ("CWLA") is an 82-year-old association of nearly 1,200 public and private child and family-serving organizations. Its member agencies collectively serve more than 3 million abused, neglected, and vulnerable children and families every year. CWLA has long been involved in the development of quality programs, practices and policies in all areas of child welfare, including the provision of services to children in foster care. Virtually all of CWLA's 50 state and approximately 150 local public child welfare agencies serve as representative payees for children eligible for SSI benefits. Other CWLA members, including non-profit direct child care agencies, on occasion also may serve as representative payees.

The Alliance for Children and Families ("Alliance") is a nonprofit membership association representing more than 350 child- and family-serving organizations across the U.S. and Canada. Alliance members serve more than 5 million individuals each year in more than 2,000 communities, including advocacy on behalf of neglected and abused children. Alliance members provide a vast array of services covering foster family care, residential care, adoption and family preservation.

Amici CDF, Catholic Charities, CWLA, and Alliance submit that the Washington State Supreme Court decision at issue before this Court could have a profound national impact upon the low income and special needs children for whom they advocate. Regardless of its potential impact on the roles that three of these organizations play as representative payees, *amici*'s interest in this case evolves more broadly from their long history of advocacy on behalf of children in the child welfare system and a particular commitment to the needs of children with disabilities. *Amici* believe that the Washington Supreme Court's decision on this important issue of federal law will eliminate the representative payee of last resort for thousands of American children with disabilities in

the public foster care system, thereby inevitably depriving these children of important attention to their disabilities, as well as SSI and other key supports essential to their well-being and healthy development. Because *amici* devote significant efforts to nationwide advocacy on behalf of children with disabilities and others in need of special support, the Washington Supreme Court decision will present new challenges to *amici* in their efforts on behalf of these children. *Amici* therefore file this brief urging reversal of the Washington Supreme Court's decision because that holding not only runs counter to the governing federal law, but has potentially profound national public policy implications that could adversely impact the children for whom they advocate.

STATEMENT OF THE CASE

What began as a discrete dispute regarding a long-since abandoned effort by an employee of the Washington Department of Social and Health Services ("DSHS") to remove one child's grandmother as his representative payee for receipt of the child's Social Security benefits (the only time DSHS alleges that an employee has ever tried to remove a private representative payee) has since transformed into a class-wide decision by the Washington Supreme Court standing contrary to federal law and invalidating a federal policy endorsed by the Social Security Administration ("SSA") and followed by every State in some form. Despite its beginnings, this case has produced a decision of such potentially profound national impact that, in addition to the *amici* on this brief, the U.S. Solicitor General and the Attorneys General for 26 states and the Commonwealth of Puerto Rico all have filed briefs with this Court in support of Petitioners' efforts to seek reversal. The national issue before the Court relates to the manner in which state agencies such as DSHS, acting as representative payees for Social Security benefits for children in foster care,

utilize those benefits to pay for the children's current care, maintenance, and special needs, consistent with their best interests.

In the State of Washington, dependent children who have been abandoned, neglected or abused or who have no parent, guardian, or other custodian capable of adequately caring for them are placed in foster care under the care and custody of DSHS. While placement of the child with a relative is the preferred option under Washington law (Wash. Rev. Code § 13.34.130(2)), DSHS will assume responsibility for a child's care when there is no suitable relative willing and/or able to provide appropriate nurturing and care.[3] A number of the children receiving foster care in Washington are eligible for one or both of two types of benefits under the Social Security Act: (1) SSI benefits under Title XVI of the Social Security Act, 42 U.S.C. §§ 1381, *et seq.*, for children who are blind or disabled and who do not have sufficient income or resources to maintain a minimum standard of living; and (2) benefits for unmarried minor children who were dependent upon a wage earner entitled to retirement benefits under Title II of the Act and whose support has now been lost, due to the wage earner's death or disability. *See* 42 U.S.C. §§ 401, *et seq.*[4] To qualify for SSI benefits, the child must not only establish a disability, but must meet certain income and resource limits. *See* 42 U.S.C. § 1382-1382d; 20 C.F.R. § 416.02. Unlike a Title II beneficiary, a child receiving SSI may lose her benefit eligibility if she accrues resources above a certain minimal level, currently $2,000. 20 C.F.R.

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[3] As of September 1999, there were 10,578 foster children in the care of DSHS. *See* Appendix to Petition for a Writ of Certiorari (hereinafter "App.") at 49, ¶ 3.

[4] Of the 10,578 foster children in foster care in Washington in September 1999, approximately 923 children received SSI benefits under Title XVI, 469 children received Title II benefits, and 88 children received both. App. at 49, ¶¶ 6-7.

§ 416.1205(c). Accordingly, in order to maintain eligibility, the SSI recipient's resources must be carefully monitored and administered to stay within the recognized federal limits.

In the case of minor children, such as those in Washington's foster care system who are eligible for SSI or Title II benefits, the federal Commissioner of Social Security ("Commissioner") will appoint a representative payee to receive and administer Title II and/or SSI benefits on behalf of each child. 20 C.F.R. §§ 404.2010(b); 416.610(b). Under federal law, the Commissioner is authorized to designate a representative payee only where it would serve the "best interests" of the beneficiary. 42 U.S.C. §§ 405(j)(1)(A); 1383(a)(2)(A)(ii)(I). Just as with Washington's state foster care provisions, federal Social Security regulations provide that the appointed representative payee should be a parent, step-parent, relative or close friend, if possible, but that—as a matter of last resort—the Commissioner may appoint an authorized social service agency, such as DSHS. 20 C.F.R. §§ 404.2021(b); 416.621(b).

Following the appointment of a representative payee, the Social Security Act (the "Act") and its implementing regulations contain a number of provisions imposing continuing Commissioner oversight on the appointed payee, who is to be evaluated in accordance with a host of requirements designed to ensure that the benefits are used for current care expenses in the child's best interests. Among the Act's protections is an anti-attachment provision that discourages creditors from employing legal process (such as garnishment or attachment) to require representative payees to use the benefits to pay the past debts of the beneficiary. 42 U.S.C. § 407(a). If the Commissioner determines that the payee has misused benefits by improperly using them to pay creditors for past debts (or some other misuse), federal law requires that the Commissioner promptly terminate payment of benefits to the payee and certify payment to an alternative payee. 42 U.S.C §§ 405(j)(1)(A); 1383 (a)(2)(A)(iii).

In this case, in accordance with the foregoing procedures, the Commissioner appointed DSHS to be the representative payee for the children in the Respondent class, each of whom receives (or received) foster care from the State of Washington and is (or was) eligible to receive SSI and/or Title II benefits. App. at 7-13. Following its appointment as representative payee, DSHS began receiving payments from the SSA on behalf of the minor beneficiaries in its care and used those funds to pay for the costs of current maintenance for the children. *Id.* Included among the costs of current maintenance were certain foster care expenses. In other words, DSHS would reimburse itself for foster care provided to beneficiaries from the Title II and SSI benefits those beneficiaries received, and place any remaining money in interest bearing accounts. *Id.* It is undisputed that all of these "reimbursed" foster care expenses consist of costs for current maintenance and are spent on the beneficiaries. *Id.*

The Commissioner, pursuant to his ongoing review and oversight responsibilities, has reviewed and approved DSHS's administration of Social Security benefits, including specifically DSHS's policy of applying SSI and Title II benefits to foster care expenses. In August 1998, the SSA conducted an audit of DSHS and found no defects in its performance as a representative payee. *See* Brief for the United States as Amicus Curiae in the Supreme Court of the United States (Petition stage) at 7. To the contrary, the SSA determined that DSHS's administration of benefits was exemplary, concluding that DSHS "is a model agency that could stand as a prototype for effective organizational payeeship." App. at 78.

Nevertheless, Respondents instituted the present suit in 1996 alleging that DSHS's administration of Social Security benefits violated federal law. In particular, Respondents alleged that DSHS's use of benefits to pay a portion of the costs of foster care for the beneficiaries—even though such

funds are expended solely for the current maintenance of the beneficiaries—violates the anti-attachment provision of the Act, 42 U.S.C. § 407(a).

Following class certification on behalf of all past, present and future foster children in Washington who receive SSI or Title II benefits for whom DSHS acts or has sought to act as representative payee, the Okanogan County Superior Court entered summary judgment in favor of the Respondents. Petitioners appealed to the Washington Court of Appeals, which certified the case to the Washington Supreme Court. According to the five-justice majority of the Washington Supreme Court, the "critical question" before it was whether DSHS "acts as a creditor . . . when it reimburses itself for foster care costs out of the foster children's benefits." App. at 19-20. Following two oral arguments and a remand to the trial court for additional fact-finding, the Court concluded that DSHS does act as a creditor in violation of the Social Security Act and therefore affirmed the trial court's decision. Petitioners timely filed a Petition for a Writ of Certiorari ("Petition") seeking review of that decision with this Court. The Petition was granted on May 28, 2002.

The question now before this Court is whether, under federal law, DSHS—in its role as representative payee for foster children eligible to receive SSI and Title II benefits—properly may use those benefits to pay for the current care and maintenance of the beneficiaries, including devoting a portion of the benefits to pay for foster care expenses for those children.

SUMMARY OF ARGUMENT

The Court should reverse the decision of the Washington Supreme Court and hold that federal law permits a state agency acting as representative payee on behalf of a foster child eligible to receive SSI and/or Title II benefits to use those benefits to pay for the current care and maintenance of

the child, including devoting a portion of the benefits to pay for foster care expenses for the children. This holding would: (1) comport with the governing federal law, as recognized by the courts from other jurisdictions who have addressed this issue; (2) correspond with the interpretation reached by the federal agency charged with interpreting and implementing the federal law in question; and (3) remedy the national public policy concerns raised by the Washington Supreme Court's decision.

ARGUMENT

I. THE WASHINGTON SUPREME COURT'S DECISION SHOULD BE REVERSED BECAUSE THE STATE COURT MISAPPLIED GOVERNING FEDERAL LAW.

This case revolves on questions of interpretation of federal law. Chief among these questions are whether DSHS has (1) complied with the Act's requirements that the representative payee utilize the child's Social Security benefits on current care and maintenance and/or (2) acted as a creditor and used legal process to secure the child's benefits to pay past debts owed by the child in violation of the Act's anti-attachment provision. As is evident from the plain language of the governing statutes and regulations, DSHS's practice fully complied with the applicable federal law. Therefore, not surprisingly, the other federal and state courts to address this issue all agree on the validity of this practice in general, and, indeed, the Commissioner specifically approved the practice by DSHS in this particular case. Accordingly, the Court should reverse the decision of the Washington Supreme Court on this important question of federal law.

A. DSHS's Use of Social Security Benefits Comports with the Requirements of the Social Security Act and Implementing Regulations.

The Social Security Act and its implementing regulations make plain that a representative payee should expend a child's benefits "only for the use and benefit of the beneficiary in a manner . . . in the best interests of the beneficiary." 20 C.F.R. §§ 404.2035; 416.635(a). The regulations, in turn, provide that the benefits are used in the child's best interests "if they are used for the beneficiary's current maintenance," which expressly includes the "cost incurred in obtaining food, shelter, clothing, medical care, and personal comfort items," with any remaining amount conserved or invested. 20 C.F.R. §§ 404.2040(a)(1); 404.2045; 416.640(a); 416.645.

Here, Respondents do not contest DSHS's ability to serve as a representative payee. Likewise, it is undisputed that the foster care expenses were spent on or for the beneficiaries, with remaining amounts placed in interest-bearing accounts. App. at 11-13. It is also undisputed that these expenses included precisely the same types of costs (*i.e.*, food, clothing, shelter, and other needs) that the governing federal regulations authorize and recognize as being in the best interests of the beneficiary. *Id.* Indeed, after having conducted an audit of DSHS in August 1998, the Commissioner has concluded that DSHS's use of SSI and Title II funds to pay for foster care expenses is in the beneficiaries' "best interests" and fully complies with representative payee portions of the Act and corresponding regulations. *See* Brief for the Amicus Curiae Kenneth Apfel, Comm'r of the U.S. Social Security Admin., in the Supreme Court of Washington ("Commissioner's Br.") at 12, 15.

Nevertheless, Respondents contend (and the Washington Supreme Court held) that, in its capacity as representative payee, DSHS cannot use Social Security benefits to pay for

foster care expenses for the Social Security beneficiary because—regardless of whether it complies with the representative payee terms of the Act—such practice violates the Act's anti-attachment provision, 42 U.S.C. § 407(a). *See* App. at 30. This contention entirely misses the mark. Far from being irrelevant, DSHS's compliance with the representative payee provisions is dispositive of the issues before the Court. That is, because DSHS's actions comply with the Social Security Act's representative payee provision and regulations, those same actions cannot then be construed simultaneously to violate the anti-attachment portion of the Act.

All of the Act's provisions must be read together and as parts of a whole. *See United Food and Chemical Workers Union Local 751 v. Brown Group, Inc.*, 517 U.S. 544, 549-550 (1996). Pursuant to this fundamental rule of statutory construction, Section 407(a)'s prohibition on "creditors" using "legal process" to obtain benefits cannot outlaw actions condoned (if not required) by § 405(j)'s treatment of representative payees. "Section 407(a) was not intended to outlaw a procedure expressly authorized by the Social Security Administration's own regulations." *King v. Schafer*, 940 F.2d 1182, 1185 (8th Cir. 1991). To hold otherwise would render a portion of the Act meaningless. Accordingly, if DSHS's use of SSI and Title II benefits for current maintenance (such as foster care) complies with § 405(j) and the corresponding regulations (and it does), that same practice cannot then violate § 407(a). *Id.*; *Mason v. Sybinski*, 280 F.3d 788, 792-93 (7th Cir. 2002) (a "representative payee's responsible management of a Social Security recipient's benefits cannot amount to" a violation of § 407(a)). For this reason alone, the Washington Supreme Court's holding cannot stand.

B. The Act's Anti-Attachment Provision Simply Does Not Apply to DSHS's Practice.

Even when read on its own and without reference to DSHS's compliance with the Act's representative payee terms, the anti-attachment provision simply does not apply to DSHS's conduct here. Accordingly, the Washington Supreme Court's decision should be reversed.

Section 407(a) is designed to impede creditors who would employ legal process to acquire a portion of a beneficiary's benefits in order to pay the past debts of the beneficiary. Specifically, the section provides that future benefits payments are not "transferable or assignable" and are not subject to "execution, levy, attachment, garnishment, or other legal process." 42 U.S.C. § 407(a). Here, however, DSHS's use of benefits to pay for foster care expenses is neither an assignment of future payments, nor an execution, levy, attachment, garnishment or other legal process. Rather, it is the use of present funds, received by DSHS in accordance with the terms of the Act, to pay for current expenses and does not require DSHS to resort to garnishment, attachment or any such legal process. As such, by its own terms, § 407(a) simply cannot apply.

Moreover, while § 407(a) makes clear that the representative payee "may not be *required* to use benefit payments to satisfy a debt of the beneficiary," it is *permissible* for a payee to satisfy such a debt "if the current and reasonably foreseeable needs of the beneficiary are met." 20 C.F.R. 404.2040(d). Indeed, the Act does not even prohibit a creditor of the child from serving as representative payee in all instances. *See* App. at 33 (concurring in part, dissenting in part) ("The Social Security Act . . . does not rule out appointment of a creditor as representative payee in all situations."). Thus, the Washington Supreme Court was far too broad in its conclusion that, "[i]f DSHS's reimbursement scheme is that of a creditor, the anti-attachment provisions of

§ 407(a) apply and DSHS's cost recovery policy runs afoul of a federal statute which preempts state law." App. at 20. To the contrary, even if DSHS could be characterized as a creditor, and even if the beneficiary's benefits were employed to satisfy his past debts (both dubious assumptions), the anti-attachment provisions nevertheless would permit DSHS to act as the representative payee and to use the funds in this manner so long as the Commissioner deems DSHS "acceptable to serve" and so long as the "current and reasonably foreseeable needs of the beneficiary are met." 42 U.S.C. § 405(j)(2)(C)(iii)(V); 20 C.F.R. 404.2040(d). As noted above, the Commissioner has evaluated DSHS's performance as representative payee and concluded that DSHS is acceptable to serve as payee and that the beneficiary children's needs are being met. Accordingly, even when DSHS is viewed as a creditor, its practice does not run afoul of the anti-attachment provision.

Importantly, this reading of the anti-attachment provisions is unlikely to open any loopholes for creditors seeking to prey upon Social Security beneficiaries in foster care. In particular, this reading would do nothing to increase the chances of: (1) a creditor being appointed to serve as representative payee (and thereby gain access to the beneficiary's funds); or (2) a non-payee creditor acquiring a portion of the child's benefits. While, as noted above, the Act does not absolutely preclude appointment of a creditor as representative payee in all instances, it does so in the vast majority of cases. *See* 42 U.S.C. § 405(j)(2)(C). The Act certainly prohibits the appointment of a creditor who provides the beneficiary "with goods and services for consideration"—a bar inapplicable to DSHS, but well-suited to screen out most, if not all, potential creditors. 42 U.S.C. § 405(j)(2)(C)(i)(III). If a creditor cannot gain appointment as a payee, the creditor is unable to access the beneficiary's funds unless the creditor resorts to a form of legal process expressly prohibited by 42 U.S.C. § 407(a).

Moreover, even if a creditor is selected to serve as representative payee, as outlined above, the child's benefits still cannot be expended to pay past debts unless the Commissioner deems the creditor "acceptable to serve," the "current and reasonably foreseeable needs of the beneficiary are met," and the child's "best interests" are protected. 42 U.S.C. § 405(j)(2)(C)(iii)(V); 20 C.F.R. 404.2040(d); 20 C.F.R. §§ 404.2035; 416.635(a). Thus, approval of DSHS's appointment and practices in this case would not permit third-party creditors to seize a child's benefits at the expense of the child's special needs and interests.

C. The State Court's Decision Discriminates against Agencies Serving as Representative Payees.

The Washington Supreme Court's decision not only fails to comport with the relevant statutory language, but its interpretation of the Act also would have the illogical result of simultaneously *requiring* all non-agency representative payees to use SSI and Title II benefits to pay for the costs of a child's current care while *preventing* agency payees from using the benefits to pay for an entire category of current maintenance (*i.e.*, foster care). Under the Washington Supreme Court's decision, DSHS—by virtue of its status as a state agency—finds itself far more restricted in how it may spend Social Security benefits on the beneficiaries' behalf than any other payee would be. This conclusion is not only contrary to the governing statutes and regulations, but also contrary to logic. There is no reason to treat a state agency acting as a representative payee differently (or, indeed, worse) than any other representative payee. Where, as here, a representative payee uses Social Security benefits to pay for current maintenance—whether that payee is a state agency or private individual—such conduct complies with governing federal law.

D. Other Federal and State Courts Have Endorsed the Practice Followed by DSHS.

Based on the foregoing, it is not surprising that the other federal and state courts to address this issue have concluded that the practice followed by DSHS in this case fully comports with the Act and its regulations. *See Mason*, 280 F.3d at 792 (holding that a representative payee's decision to apply benefits to the recipient's cost of care does not violate § 407(a) "even when the payee is the state itself"); *King*, 940 F.2d at 1185 (holding that Section 407(a) does not bar a State from using benefits to pay for maintenance of children under its care); *C.G.A. v. Alaska*, 824 P.2d 1364, 1369 n.14 (Alaska 1992) (holding that the state may act as representative payee and "could legitimately apply [the child's] benefits toward foster care"). In addition, as Petitioners note, the Washington Supreme Court decision appears to be in substantial tension with the caselaw of Kansas and Minnesota, as well. *See* Petition at 20-21 (citing *Mellies v. Mellies*, 815 P.2d 114 (Kan. 1991) and *In re the Guardianship of Nelson*, 547 N.W.2d 105 (Minn. Ct. App. 1996)). The reasoning of these cases is sound, and compels a different result than that reached by the Washington Supreme Court.

Indeed, the Washington Supreme Court was unable to cite to any prior decision on point that supported its holding. The four cases relied upon by the state court present entirely different factual scenarios and are imminently distinguishable from the case at bar. *See Philpott v. Essex County Welfare Bd.*, 409 U.S. 413 (1973); *Bennett v. Arkansas*, 485 U.S. 395 (1988); *Brinkman v. Rahm*, 878 F.2d 263 (9th Cir. 1989); *Crawford v. Gould*, 56 F.3d 1162 (9th Cir. 1995). None of these cases involved the expenditure of Social Security benefits by a state agency acting as a representative payee. To the contrary, the class certified in *Brinkman* specifically excluded persons for whom the state served as representative payee. *Brinkman*, 878 F.2d at 264.

Accordingly, the more relevant authority is that of *Mason*, *King*, and *C.G.A.* In circumstances similar to those presented here, those courts apparently concluded, as this Court should, that federal law permits a state agency acting as representative payee on behalf of a foster child for SSI and/or Title II benefits to use those benefits to pay for the current care and maintenance of the child, including devoting a portion of the benefits to pay for foster care expenses for the children.

II. THE WASHINGTON SUPREME COURT'S DECISION FAILS TO AFFORD DUE DEFERENCE TO THE FEDERAL AGENCY CHARGED WITH INTERPRETING AND ENFORCING THE ACT.

The question presented to this Court is one of federal law. In particular, this case requires interpretation and application of the federal Social Security Act and its implementing federal regulations. The Commissioner of the Social Security Administration is tasked with the day-to-day interpretation and administration of these provisions of federal law and, as this Court has observed, the Commissioner's opinions regarding the application of the Act are entitled to due deference. However, in rendering its decision, the Washington Supreme Court disregarded the Commissioner's interpretation of the relevant law as it applies to this case and ignored the Commissioner's unique ability to ensure ongoing compliance with federal law by DSHS and similarly situated payees. The Washington Supreme Court's ruling therefore cannot be sustained.

A. The State Court Decision on a Question of Federal Law Conflicts with the Interpretation of the Federal Agency Charged with Implementing the Law.

At bottom, the Washington Supreme Court's holding was that the anti-attachment provision of a federal statute,

implemented by the Commissioner, prohibits DSHS from using beneficiaries' Social Security benefits to pay for a portion of the foster care DSHS provides to those beneficiaries. App. at 30-31. However, the Commissioner expressly has stated on multiple occasions *in this very case* (and otherwise) that a State acting as representative payee may offset the costs associated with the provision of foster care against the SSI and Title II social security benefits that a child in foster care receives. *See, e.g.*, Commissioner's Br. at 10-11. Thus, the state court effectively would substitute its judgment for that of the Commissioner with respect to this issue of federal law, a result squarely at odds with the well-established principle, announced by this Court, that the Commissioner's construction of the Act and its corresponding regulations is entitled to substantial deference. *Auer v. Robbins*, 519 U.S. 452, 457-457 (1997) (quoting *Chevron U.S.A., Inc. v. Natural Resources Defense Counsel, Inc.*, 467 U.S. 837, 842-43 (1984)).

Significantly, the Commissioner's construction of the Act and implementing regulations here is not merely an abstract reading of the governing provisions as they might apply in a vacuum; rather, it is the result of careful review and scrutiny of the specific DSHS practices at issue before the Court. In August 1998, after Respondents initiated the present suit, the Commissioner conducted an audit of DSHS's performance as representative payee, including an examination of DSHS's practice of applying Social Security benefits to pay for foster care expenses. *See* Commissioner's Br. at 12. After conducting this audit, the Commissioner subsequently filed briefs in the Washington state court proceedings expressing his conclusion that DSHS fully complied with the governing federal law. Specifically, the Commissioner stated that "foster care is a type of current maintenance" (Commissioner's Br. at 10, 12, 15) and that DSHS's use of SSI and Title II funds to pay for foster care expenses fully complies with representative payee portions of the Act and the

beneficiaries' best interests. *Id.* at 12, 15. Given the Commissioner's unique familiarity with the relevant federal laws and policy, and his careful review of the specific practices now at issue, the Commissioner's conclusions are entitled to considerable deference. This Court accordingly should hold, consistent with the Commissioner's conclusions, that DSHS is entitled to apply the at-issue benefits towards the cost of foster care under federal law.

B. The Commissioner Is Well-Equipped to Ensure Continuing Compliance with the Act and Implementing Regulations.

In addition to disregarding the Commissioner's role in interpreting the Act and the DSHS practices to date, the Washington Supreme Court further failed to recognize that the Commissioner also is in a unique position to ensure continuing compliance by DSHS (and like state agencies) on a going-forward basis, both through existing means and potential legislative and/or regulatory reforms.

The Commissioner already has in place a number of safeguards to ensure that payees such as DSHS utilize Social Security benefits in the best interests of the child, beginning with the payee selection process. As an initial step in that process, the Commissioner must attempt to identify and appoint someone who has an existing relationship with the child—a parent, step-parent, relative or close friend—as the representative payee (if possible), and will resort to appointment of an agency only as a matter of last resort. 20 C.F.R. §§ 404.2021(b); 416.621(b). Prior to appointing an agency as payee, the Commissioner is required to conduct an investigation of the agency. 42 U.S.C. §§ 405(j)(2)(A); 1383(a)(2)(B)(i). The Commissioner must also notify the beneficiary's legal guardian in writing of the appointment and provide an opportunity for appeal of the appointment. 42 U.S.C. §§ 405(j)(2)(E)(ii); 1383(a)(2)(B)(xi)-(xiii).

Following the selection of DSHS or another representative payee, the Commissioner is required to "establish a system of accountability" to ensure that the benefits are properly used and can require a written report from the payee at any time documenting on how the benefits are being used and how those usages further the child's best interests. 42 U.S.C. §§ 405(j)(3)(B) and (D); 1383(a)(2)(C)(ii) and (iv). One component of this "system of accountability," at least as it applies in this case to DSHS, requires that the representative payee submit to the SSA a yearly accounting of benefits received, used, and conserved for each child receiving benefits. App. at 67. These existing measures help ensure a payee's compliance with the applicable law.

Moreover, the Commissioner and the SSA have a number of potential additional tools at their disposal to assure that SSI and Title II benefits are not misused in the future. For example, in addition to the existing reporting requirements outlined above, the SSA could require additional accounting procedures specifically directed at states' use of Social Security benefits to reimburse foster care expenses, including documentation of the amounts of benefits used for each different expense and statistics regarding the number of beneficiaries who maintained eligibility and continued to receive SSI when they exited from foster care. Similarly, SSA could require that the foster children's case plans state precisely how the state is ensuring that each child's special needs (and, therefore, "best interests") are being addressed. In order to further this goal, SSA could require additional notice of a child's receipt of benefits to those social workers and foster parents who work with, care for, and/or otherwise have a connection with that particular child. Armed with this knowledge, and given their relationship with the individual child beneficiary, these social workers and foster parents then could request services for and advocate on behalf of the child based upon their unique familiarity with the child's special needs.

These procedural safeguards, both existing and potential, evidence that the Commissioner is well-equipped to monitor compliance with federal law and that the SSA should be allowed to do so on a case-by-case basis. In contrast, the Washington Supreme Court's decision would completely eradicate (on an across-the-board basis) a practice approved by the Commissioner and followed in every state. The state court decision therefore goes too far in eliminating a vitally important federal program for children in foster care. Accordingly, this Court should reverse the holding below.

III. THE STATE COURT DECISION MAY PROFOUNDLY AND ADVERSELY IMPACT THE AVAILABILITY AND USE OF SOCIAL SECURITY BENEFITS FOR NEEDY CHILDREN NATIONWIDE.

While this case originated with the Washington state courts, its interpretation of federal law presents issues of profound national impact, particularly as it relates to SSI beneficiaries. SSI benefits are available to children with disabilities who fall below certain minimum income and resource levels. *See* 42 U.S.C. § 1382-1382d; 20 C.F.R. § 416.02. Unlike children receiving Title II benefits, foster children receiving SSI can lose their benefit eligibility if their resources creep above a certain minimal level, currently $2,000. 20 C.F.R. § 416.1205(c). A number of states have endeavored to identify children with disabilities and, where appropriate, attempt to help these children both qualify for and subsequently maintain their eligibility for SSI benefits. The decision below could severely jeopardize those efforts.

In Washington, DSHS has retained a specially-trained staff, whose sole job it is to review the foster care caseload for children with disabilities, assess their needs, and assist them in applying to the Social Security Administration for benefits. *See* Petition at 9. Washington also appeals preliminary denials of benefits to ensure that the children

receive the benefits to which they are entitled. App. at 63. In addition, DSHS monitors each foster child beneficiary's resource level and spends down any amount exceeding the statutory maximum on the child's special needs in order to sustain his or her eligibility for SSI. App. at 64. Were it not for these efforts by the state agencies in Washington and elsewhere, the disabilities of many of these children might go unrecognized, and they would never be determined eligible for—or actually receive—benefits. The state agency's willingness to serve as representative payee is essential to these children receiving benefits. Because many of these children often have no relative, guardian or close friend who is suitable and willing to serve as a representative payee on their behalf, children depend on the state agency to perform that function. The rule announced by the Washington Supreme Court could severely affect whether and how the States decide to continue in these roles.

As the Commissioner observed, the Supreme Court of Washington's decision "hamstring[s] the Commissioner's ability to locate effective representative payees for minor children" by "eviscerat[ing] the important function" that state agencies play as representative payee. Commissioner's Br. at 8. What the Commissioner understands—and what the Washington Supreme Court failed adequately to consider—is that an agency like DSHS only acts as representative payee when there is *no one else to act in that capacity*, a result ensured by SSA regulations listing the state agencies last in the order of preference in selecting a representative payee. 20 C.F.R. § 404.2021(b). Given the fiscal pressures on state governments, Washington likely will not be able to continue the investment of staff and resources to identify children with disabilities and seek out Social Security benefits on their behalf if the Washington Supreme Court decision is allowed to stand. The state's ability to make the necessary investments to represent the child's interest to the SSA and act as a

representative payee for children will be severely impaired unless it can offset the costs involved in seeking and monitoring benefits for these children.

Precluding states from offsetting foster care expenses with Social Security benefits inevitably will produce a host of unfortunate results. If agencies like DSHS are unable to serve as representative payee (either at all or to the same extent that they have done in the past), many children in foster care who are eligible for Social Security benefits and who heretofore have had no one but such agencies (the SSA's last choice) to act as their representative payee *will not receive* their benefits. In fact, it is very likely that the severity of their disabilities and potential for receiving benefits will not even be recognized. Likewise, while a reduction in DSHS's role as representative payee does not mean that Washington's children will go without foster care, it does mean that, without the offset, there will be fewer resources for *all* of the children in foster care in Washington. This serves only to harm those unfortunate children who already have too little.

Accordingly, in addition to the loss of benefits, children who are eligible for SSI benefits would also be disadvantaged in other ways. For example, many of these children would not get the special attention that is now directed to their disabilities. The SSI application process requires a thorough assessment of the applicants' disabilities and how those disabilities impact their daily functioning. This assessment is especially important in determining the children's individual service needs. Some of the children also receive extra benefits and services that are not normally available in foster care, such as special therapy and rehabilitation, and sometimes housing modifications. They may also receive a special trust account to help pay for additional services and supports.

The receipt of these benefits not only helps ensure a minimum standard of care for the beneficiaries, but also helps

children continue to receive the services and supports they need when they are ready to leave foster care. For example, a child in foster care's eligibility for SSI, and consequently also for Medicaid, may make it easier for that child to reunite safely with his or her family, which may be overwhelmed by the financial responsibility of caring for a child with special needs. In the State of Washington in 2000, 119 children in foster care with SSI benefits were reunited with their families. In instances where the child who returns home continues to be financially eligible for SSI, the benefits help the parent adequately meet the child's special needs. Receipt of benefits may also help to facilitate adoptions for children, when returning home is not appropriate or safe, since children eligible for SSI are automatically eligible for federal Title IV-E Adoption Assistance payments. These payments help to ease the financial challenges faced by prospective adoptive parents who wish to adopt a child with special needs, and also automatically trigger the child's eligibility for Medicaid assistance. In the year 2000, 72 children receiving SSI benefits were adopted in Washington.

The receipt of SSI benefits also assists those young people who age out of foster care at age 18 or older, but who as adults with disabilities still need continuing assistance from the Social Security system. The fact that a young adult received SSI as a child in foster care can often ease the way for help from the adult system. In addition, children who receive Title II and SSI may exit care with at least some savings in a trust fund to help them as they struggle to make it on their own for the first time.

Because the State is—by federal law—the last line of defense for children in foster care who are eligible for Social Security benefits, if the State is precluded or discouraged from acting as the representative payee for those children, it is likely that no one will. These children therefore face the possibility of losing important benefits if the State cannot

assume the role of representative payee. Because the Washington Supreme Court's interpretation of the Social Security Act and regulations discourages state agencies from serving as representative payees, this decision likely will have a profound adverse impact on the very children the Act is designed to protect.

CONCLUSION

For the foregoing reasons, the Court should reverse the decision of the Washington Supreme Court and hold that the Social Security Act and implementing regulations permit DSHS (and/or a like state agency), in its role as representative payee on behalf of a foster child eligible to receive SSI and/or Title II benefits, to use those benefits to pay for the current care and maintenance of the child, including devoting a portion of the benefits to pay for foster care expenses for the children.

Respectfully submitted,

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